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No. _____

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RIO VISTA NON-PROFIT
HOUSING CORPORATION,

Appellant,

against

COUNTY OF RAMSEY,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980, which taxes the real property of certain types of institutions of purely public charity, violates the equal protection and supremacy clauses of the United States Constitution.

LIST OF PARTIES

All of the parties in this case are listed on the caption of this Jurisdictional Statement.

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OPINION BELOW

The opinion of the Supreme Court of Minnesota is reported at 335 N.W.2d 242 (1983). A copy is attached, Appendix A, pages A-1 through A-19. The findings of fact, conclusions of law, order for judgment and memorandum of the trial court are not officially reported. Copies are attached, Appendix B, pages B-1 through B-25.

JURISDICTION

This is an appeal from the final judgment of the Minnesota Supreme Court entered on August 10, 1983. The opinion of the Supreme Court of Minnesota was filed on June 24, 1983. See Appendix A, page A-1, infra. A Petition for Rehearing was filed on July 1, 1983 and was denied on August 10, 1983. See Appendix C, page C-1, infra.

A Notice of Appeal to this Court was filed in the Supreme Court of Minnesota on October 5, 1983. See Appendix D, page D-2, infra. The record has been returned to the district court by the Minnesota Supreme Court. A copy of the Notice of Appeal has been filed with the clerk of the district court. See Appendix D, page D-5.

This appeal is being docketed in this Court within 90 days from the date of entry of the final judgment of the

Minnesota Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND MINNESOTA STATUTES

Supremacy Clause, Clause 2 of Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Equal Protection Clause, Section 1 of Amendment XIV of the United States Constitution:

> . . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980:

Sec. 6. Minnesota Statutes, 1979 Supplement, Section 272.02, Subdivision 1, is amended to read:

272.02 EXEMPT PROPERTY. Subdivision 1. Except as provided in other subdivisions of this section or in section 272.025, or section 273.13, subdivisions 17, 17b, 17c or 17d, all property described in this section to the extent herein limited shall be exempt from taxation:

* * *

(6) Institutions of purely public charity except property assessed pursuant to section 273.13, subdivisions 17, 17b, 17c or 17d.1

Section 273.13, Subds. 17, 17b, 17c and 17d of Minnesota Statutes (1980):

273.13 TAXES; LISTING, ASSESSMENT

Subd. 17. Title II or state housing finance agency property used for elderly and low and moderate income families. A structure situated on real property that is used for housing for the elderly or for low and moderate income families as defined by Title II of the National Housing Act or the Minnesota housing finance agency law of 1971 or regulations promulgated by the agency pursuant

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1/ The underlined portion was added by Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980.

thereto and financed by a direct federal loan or federally insured loan or a loan made by the Minnesota housing finance agency pursuant to the provisions of either of said acts and acts amendatory thereof shall, for 15 years from the date of the completion of the original construction or substantial rehabilitation, or for the original term of the loan, be assessed at 20 percent of the market value thereof, provided that the fair market value as determined by the assessor is based on the normal approach to value using normal unrestricted rents.

Subd. 17a. The provision of subdivision 17 shall apply only to non-profit and limited dividend entities.

Subd. 17b. Valuation of farmers home administration property in municipalities of under 10,000. Notwithstanding any other provision of law, any structure:

(a) situated on real property that is used for housing for the elderly or for low and moderate income families as defined by the farmers home administration,

(b) located in a municipality of less than 10,000 population,

(c) financed by a direct loan or insured loan from the farmers home administration, and

(d) which qualifies under subdivision 17a, shall, for 15 years from the date of the completion of the original construction or for the original term of the loan, be assessed at five percent of the market value thereof, provided that the fair market value as determined by the assessor is based on the normal approach to value using normal unrestricted rents.

Section 17c. Valuation of lower income housing. A structure which is

(a) situated upon real property that is used for housing lower income families or elderly or handicapped persons, as defined in section 8 of the United States Housing Act of 1937, as amended, and

(b) owned by an entity which has entered into a housing assistance payments contract under section 8 which provides assistance for 100 percent of the dwelling units in the structure, other than dwelling units intended for management or maintenance personnel, shall, for the term of the housing assistance payments contract, including all renewals, or for the term of its permanent financing,

whichever is shorter, be assessed at 20 percent of its market value. The market value determined by the assessor shall be based on the normal approach to value using normal unrestricted rents.

Subd. 17d. Neighborhood real estate trusts. When a structure consisting of one or more dwelling units, is owned by a neighborhood real estate trust and at least 60 percent of the dwelling units are leased to or occupied by a lower income family as defined by section 8 of the United States Housing Act of 1937, as amended, the structure shall be assessed at 20 percent of the market value. This subdivision shall not apply to any portion of the structure used for nonresidential purposes.

For purposes of this subdivision, neighborhood real estate trust means an entity which (a) is a nonprofit corporation organized under chapter 317; (b) has as its principal purpose providing housing for lower income families in a specific geographic community designated in its articles or bylaws; (c) limits membership with voting rights to residents of the designated community; and (d) has a board of directors consisting of at least seven directors, 60 percent of whom are voting members and 25 percent of whom are elected by

resident members of buildings owned by the trust.

STATEMENT OF THE CASE

1. HOW THE FEDERAL QUESTION WAS PRESENTED.

At the earliest stage of the proceedings below, appellant raised the issue, in its Petition filed in the trial court to recover the real estate taxes which it paid in 1981, that the statute taxing its property "is unconstitutional because it violates the supremacy clause of Clause 2 of Article VI of the United States Constitution, the equal protection clause of Section 1 of Amendment XIV of the United States Constitution, and the uniformity clause of Article X, Section 1, of the Minnesota Constitution." The trial court held that ". . . the classification made by the 1980 amendment is void because it violates the uniformity clause of the Minnesota Constitution and the equal protection clause of the

Federal Constitution," Appendix B, page B-15, and ". . . the 1980 amendment is void because it also violates the supremacy clause of Clause 2 of Article VI of the United States Constitution." Appendix B, pages B-23 and B-24.

In its brief filed with the Supreme Court of Minnesota, appellant argued that "the 1980 law is unconstitutional because there is no reasonable basis for distinguishing respondent from other institutions of purely public charity which own property that is not taxed, and therefore taxing the property of respondent is a violation of the uniformity clause of the Minnesota Constitution and the equal protection clause of the United States Constitution," and that "the 1980 law violates the supremacy clause of Clause 2 of Article VI of the United States Constitution because it taxes only the property of certain institutions of purely public charity

which do business with the federal government, but not the property of all other institutions of purely public charity." The Minnesota Supreme Court held ". . . that a tax classification of residential publicly subsidized housing projects to equalize tax benefits does not violate either the equal protection clause of the federal constitution or the uniformity clause of the Minnesota constitution," Appendix A, page A-15, and that ". . . respondent has not met its burden of proving a supremacy clause violation in Minn. Stat. § 272.02, subd. 1(6). . .," Appendix A, page A-18. The Minnesota Supreme Court thus considered and expressly rejected the federal constitutional claims.

2. STATEMENT OF THE FACTS.

The facts in this case are not disputed. Rio Vista Non-Profit Housing Corporation ("Rio Vista") is a Minnesota

corporation which was incorporated in 1971 under Chapter 317 of Minnesota Statutes, the Minnesota Non-Profit Corporation Act. It was formed for the sole purpose of owning and operating rental housing for low income persons without means to afford such housing. It owns and operates four buildings which contain 48 rental units. It has never owned any other property and it has never engaged in any business other than the ownership and operation of rental properties for low income persons.

Rio Vista is able to provide decent housing for low income persons because of the assistance it receives under two governmental programs which commonly are referred to as the Section 236 Program[2] and the Rent Supplement Program.[3] Both

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2/ The Section 236 Program is codified at 12 U.S.C. 1715z-1.

3/ The Rent Supplement Program is codified at 12 U.S.C. § 1701s.

programs supplement the rental income that tenants of Rio Vista are able to pay. For example, for the year 1980, the year for which the taxes in issue were levied, Rio Vista had total income of $140,583.00 of which $71,034.00 was received from tenant rentals, $25,303.00 from the Rent Supplement Program, and $40,081.00 from the Section 236 Program.[4]

Rio Vista borrowed the entire amount needed for the land and construction costs of the buildings it owns. Its promissory note, which is insured by the federal government, bears a seven percent interest rate. Under the Section 236 Program, the federal government pays the difference between a mortgage cost of one percent and the seven percent interest rate. In other words,

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4/ The only other income was $4,165 from miscellaneous sources such as security deposit forfeitures, laundry room income and interest.

Rio Vista pays its mortgagee the amount of principal and interest computed at a one percent interest rate and the balance of the six percent interest cost is paid by the federal government. The federal government pays its share of the interest cost directly to the mortgagee. The benefit to the tenant is that his rent is based upon a one percent interest cost rather than a seven percent interest cost.

The second federal subsidy program is the Rent Supplement Program. It provides an additional subsidy to very low income tenants who are unable to pay a rent based upon a one percent interest cost. Generally, the tenants assisted are those tenants having a monthly income that is less than four times the amount of monthly rent that must be paid for the unit occupied, again here basing rent on a one percent interest cost.

For example, assume a tenant with a monthly income of $300.00 who occupies a unit having a monthly rent of $150.00. The tenant will pay 25 percent of his income, or $75.00 per month, as rent, and the difference of $75.00 per month would be paid by the federal government as a rent supplement.

Note, and this point will be referred to again, that the amount of the federal subsidy under both the Rent Supplement and Section 236 Programs is not affected by whether the property is or is not subject to tax. The subsidy under both programs remains the same. In other words, if the property of Rio Vista is taxed, the tax will have to be paid by the tenants. Rio Vista has no income other than tenant rents and the subsidies received from the federal government, and the agreements between Rio Vista and the government under which

the subsidies are received contain no provision for increases if real estate taxes are imposed.

The Section 236 and Rent Supplement Programs are important instrumentalities in carrying out a congressional purpose to provide decent, safe shelter to persons unable to afford such shelter. President Lyndon Johnson characterized the rent supplement as "The most crucial new instrument in our effort to improve the American city . . ."[5]. The Section 236 Program was passed ". . . to provide decent housing for many low and moderate income families who cannot afford it now. . .".[6] Attached hereto, Appendix

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5/ H.R. No. 365, 89th Cong., 1st Sess., U.S. Code Cong. and Adm. News, p. 2617 (1965).

6/ H. R. No. 1585, 90th Cong., 2d Sess., U.S. Code Cong. and Adm. News, p. 3080 (1968).

E, pages E-1 and E-2, infra, is a letter from the Department of Housing and Urban Development which states that there presently are 6,910 rental units owned by 97 nonprofit corporations in Minnesota which are assisted under the Rent Supplement, Section 236 or Section 8 Programs.[7]

Prior to 1976, Appellant paid the real estate taxes levied against its

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7/ The Section 8 Program was enacted as a part of the Housing and Community Development Act of 1974 and is codified at 42 U.S.C. § 1437f. It is a successor program to the § 236 and Rent Supplement Programs. Generally, a tenant benefited by the Section 8 Program pays between 10% and 30% of family income as rent, depending upon the family income level and family size, and the Section 8 Program pays the balance. Generally, corporations formed after 1974 receive assistance under the Section 8 Program rather than the Section 236 or Rent Supplement Programs. Institutions of purely public charity receiving Section 8 assistance are taxed under the 1980 law as their property is assessed pursuant to Section 273.13, subd. 17c of Minnesota Statutes.

land and buildings. Its land and buildings were then assessed pursuant to Section 273.13, subd. 17 of Minnesota Statutes, quoted on pages 7 and 8, supra. In 1976, Appellant commenced an action to have its property declared exempt under Section 272.02, Subd. 1(6) of Minnesota Statutes, which exempted property owned by institutions of purely public charity. The claim of Appellant to exemption was upheld in Rio Vista Non-Profit Housing Corporation v. County of Ramsey, ____ Minn. _____, 277 N.W.2d 187 (1979). Thereafter, the Minnesota Legislature passed Chapter 607, Article II, Section 6 of Laws of Minnesota (the "1980 law"). The 1980 law is quoted at pages 6 and 7, supra. The admitted purpose for the passage of the 1980 law was to tax appellant as it was taxed prior to the earlier Rio Vista decision.

The parties stipulated in district court (paragraph 21 of the Stipulation of Facts):

> The purpose for passage of Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 was to classify and tax the property of petitioner in the same manner as its property was classified and taxed prior to the decision of Rio Vista Non-Profit Housing Corporation v. County of Ramsey, ____ Minn. ____, 277 N.W.2d 187 (filed February 23, 1979).

The 1980 law accomplishes its purpose by taxing only the property of institutions of purely public charity that is assessed under Section 273.13, subds. 17, 17b, 17c or 17d of Minnesota Statutes. The only institutions of purely public charity having property assessed pursuant to one of those subdivisions are appellant and organizations like appellant. Paragraphs 24 and 25 of the Stipulation of Facts filed by the parties in district court provide:

24. There are four organizations, including petitioner, which own properties which are subject to tax by virtue of Chapter 607, Article II, Section 6, of Laws of Minnesota for 1980. Prior to the decision in Rio Vista Non-Profit Housing Corporation, paragraph 21, supra, the properties owned by these four organizations were taxable pursuant to Section 273.13, Subd. 17, of Minnesota Statutes. Following the Rio Vista decision, and prior to passage of Chapter 607, Article II, Section 6, of Laws of Minnesota for 1980, these properties were exempt from real estate taxation.

25. All of the four organizations referred to in the preceding paragraph 24 provide housing for tenants without means to acquire decent and safe housing and all of them receive an operating subsidy from the federal government under either the Rent Supplement or a comparable program. The properties owned by the approximately 73 other institutions of purely public charity referred to in paragraph 23 are not subject to any property tax.

Thus, the only organizations which are taxed under the 1980 law are organizations like appellant which provide

housing for tenants without means to acquire decent, safe housing and which receive an operating subsidy from the federal government under either the Rent Supplement or a comparable program. None of the remaining institutions of purely public charity in Minnesota is subject to tax.

THE QUESTION IS SUBSTANTIAL

1. THE SUPREMACY CLAUSE ISSUE.

The cases of M'Culloch v. Maryland, 4 Wheat. 316; Phillips Co. v. Dumas School District, 361 U.S. 376 (1960); and Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961), hold that a state statute may not discriminate against the federal government or those with whom the federal government deals. The parties have stipulated, pages 21 and 22, supra, that the purpose of the 1980 law was to tax appellant and that

the only organizations taxed under the 1980 law are appellant and organizations like it that provide decent housing pursuant to federal programs which provide a subsidy under either the Rent Supplement Program or a comparable program. No other organizations are taxed. Notwithstanding this seemingly clear agreement that the purpose of the 1980 law was to tax appellant and organizations like it, the Minnesota Supreme Court held that appellant ". . . has not proved beyond a reasonable doubt that the statute, which is nondiscriminatory by its very terms, is discriminatory in effect." Appendix A, page A-18. The holding of the Court is clearly wrong. The parties have stipulated in unmistakably clear language, paragraphs 21, 24 and 25 of the Stipulation, pages 21 and 22, supra, that the purpose of the 1980 law was to tax

appellant and organizations like appellant and that only appellant and organizations like it are in fact taxed under the 1980 law. The Court simply disregards these undisputed facts.

Appellee did argue in the Minnesota Supreme Court that, notwithstanding the Stipulation of the parties, the purpose of the statute was not to tax only appellant and organizations like it but rather was to tax state-subsidized housing as well as federal-subsidized housing. The reference by the Minnesota Supreme Court in its holding, quoted on the preceding page, to the statute "which is nondiscriminatory by its very terms," apparently adopts appellee's argument. It is true that the terms of the 1980 law are nondiscriminatory because the law is sufficiently broad to tax state-subsidized institutions of purely public charity, but the crucial

fact is that there are no state-subsidized institutions of purely public charity. Appellee admitted in its brief filed in the Minnesota Supreme Court that it did not know of any. There are no Minnesota Statutes comparable to the federal statutes which provide for the Rent Supplement and Section 236 Programs[8] and there are no state-subsidized organizations taxed under the 1980 law. Is a state statute which taxes only organizations doing business with the federal government unconstitutional under the supremacy clause notwithstanding that it is sufficiently broad to tax state-subsidized organizations if there are no state-subsidized organizations? A comparable issue was involved in United States v. State of Tennessee, ____ F.2d

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8/ The federal statutes are cited at footnotes 2 and 3, supra, p. 14.

____ (6th Cir., March 28, 1983), affirming 531 F.Supp. 62 (E.D. Tenn. 1981),[9] where the City of Oak Ridge, Tennessee, levied a privilege tax upon the production of special nuclear material. The statute levying the tax by its terms was not directed at any particular organization but rather applied to the production "by any person" of special nuclear material. In the entire United States, there were only three facilities which operated the kind of business taxed under the Tennessee Statute. One of the facilities was in the State of Tennessee. The United States argued that the Tennessee Statute discriminated against it and its contractors because only the one facility was taxed. The State argued

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9/ Copies of the decisions by the district court and the circuit court of appeals are attached hereto, Appendix F and Appendix G.

that the Tennessee Statute was sufficiently broad to apply to all contractors, notwithstanding that only the one facility was taxed. The district court said that the Court must look "through form and behind labels to substance," quoting from City of Detroit v. Murray Corp., 355 U.S. 489, 492 (1958) and continued:

> . . . When this is done, we find that the Oak Ridge Plant, which is producing special nuclear material as directed by Congress, 42 U.S.C. § 2061(b), is burdened with a tax which no other entity in the State must pay. This, in the opinion of the Court, is contrary to the Supremacy Clause of the Constitution. 531 F.Supp., p. 66, Appendix F, p. F-21.

Upon appeal, the Court said:

> . . . United States District Judge Robert Taylor, in a careful opinion, rejected defendants' assertion that the tax at issue was broad enough to apply to entities other than federal contractors. Judge Taylor observed that this argument ignores the practical application of the

> statute which in fact burdens only the federal government by imposing a tax solely upon government property. Upon the record before the district court, we agree that the tax imposed contravenes the Supremacy Clause of the Constitution. Appendix G, page G-6.

The State of Tennessee case was decided after the instant case was briefed and argued before the Minnesota Supreme Court, but before the Court's decision. When appellant learned of the circuit court decision, it immediately wrote to the Court, and sent a copy of its letter to appellee. A copy of its letter is attached, Appendix H, pages H-1 through H-4. Appellee made no reply to appellant's letter and the decision of the Minnesota Supreme Court does not refer to the State of Tennessee case. In its Petition for Rehearing,[10]

10/ A copy of appellant's Petition for Rehearing is attached, Appendix I, pages I-1 through I-18, infra,

appellant relied principally upon the State of Tennessee case. The denial by the Minnesota Supreme Court of appellant's Petition for Rehearing, Appendix C, pages C-1 and C-2, does not mention the State of Tennessee case.

In its Answer to Appellant's Petition for Rehearing, appellee argued that the State of Tennessee case was not applicable because (1) the tax in the instant case is not directed against appellant, and (2) the United States is not a party in the instant case. With respect to the first argument, the parties have stipulated, as pointed out on page 21, supra, that the purpose of

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(Footnote 10, continued)

except that copies of the district court and Court of Appeals decisions in the State of Tennessee case have not been reprinted as a part of the Petition for Rehearing. Copies of those decisions are attached hereto, Appendix F and Appendix G.

the 1980 law was to tax appellant and organizations like appellant. It is difficult to understand how the parties could have stipulated more clearly that the tax was directed against appellant. It is true, as appellee argued on page 4 of its Answer to appellant's Petition for Rehearing, that the 1980 law, by its express terms, ". . . applies equally to low and moderate income housing, whether financed by the federal government or by the State of Minnesota. . .", but a comparable argument was made, and rejected, in the State of Tennessee case where the only entity taxed was the entity financed by the federal government.

With respect to the second of appellant's arguments, it is not necessary that the United States be a party. In neither of the Phillips Co. nor Moses Lake Homes cases, supra, page 23, was

the United States a party. Phillips Co. specifically holds that a state tax may not discriminate against the government "or those with whom it deals." 361 U.S. 387.

The attached letter from the Department of Housing and Urban Development, Appendix E, pages E-1 and E-2, states that there are 6,910 units owned by 97 nonprofit corporations in Minnesota that are subsidized under the Section 236, Rent Supplement and Section 8 Programs. Rio Vista owns 48 units and paid a real estate tax of $15,863.36 in 1981. This is a tax cost of approximately $330.00 for each unit ($15,863 divided by 48). Projecting a similar per unit tax cost for all of the 6,910 units, approximately $2,300,000 of taxes are involved. Appellant acknowledges that this is not a precise method for determining the amount of real estate taxes affected by this action, and that

it is possible that some of the 97 non-profit corporations which own the 6,910 units may not qualify as an institution of purely public charity, but nonetheless it appears undeniable that the 1980 law imposes a substantial tax burden each year on the tenants of appellant and organizations like it. Moreover, if the 1980 law is permitted to stand, other states, in their constant search for new revenue, undoubtedly will adopt comparable statutes. The tax burden imposed by the 1980 law upon tenants of federally-assisted housing, and the statutes which other states surely will enact if the holding in the instant case is permitted to stand, will impede in a substantial way the ability of the federal government to provide decent housing for such tenants.

2. THE EQUAL PROTECTION ISSUE - THE ABSENCE OF A RATIONAL BASIS

For purposes of this Jurisdictional Statement, appellant agrees that the applicable test under the equal protection clause is whether the statutory classification made by the 1980 law bears a rational relationship to a legitimate governmental purpose. Regan v. Taxation With Representation, 103 S.Ct. 1997 (May 23, 1983). Further, appellant acknowledges that a legitimate governmental purpose exists for enactment of the 1980 law, i.e., to raise revenues for the support of state government. Appellant's argument is that the statutory classification made by the 1980 law is not rationally related to a legitimate governmental purpose.

The 1980 law singles out for taxation institutions of purely public charity having "property assessed

pursuant to Section 273.13, Subds. 17, 17b, 17c or 17d."[11] The properties referred to in those subdivisions are:

> 1. Property that is used for housing for the elderly or for low and moderate income families as defined by Title II of the National Housing Act or the Minnesota housing finance agency law of 1971 or regulations promulgated by the agency and financed by a direct federal loan or federally insured loan or a loan made by the Minnesota housing finance agency (Subd. 17).
>
> 2. Real property that is used for housing for the elderly or for low and moderate income families as defined by the farmers home administration, located in a municipality of less than 10,000 population and financed by a direct loan or insured loan from the farmers home administration (Subd. 17b).
>
> 3. Real property that is used for housing lower income families or elderly or handicapped persons, as defined in

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11/ Section 273.13, Subds. 17, 17b, 17c and 17d are quoted on pages 7, 8, 9, 10 and 11, supra.

section 8 of the United States Housing Act of 1937, and owned by an entity which has entered into a housing assistance payments contract under section 8, which provides assistance for 100 percent of the dwelling units in the structure (Subd. 17c).

4. A structure consisting of one or more dwelling units, which is owned by a neighborhood real estate trust, and at least 60 percent of the dwelling units of which are leased to or occupied by a lower income family as defined by section 8 of the United States Housing Act of 1937 (Subd. 17d).

All institutions of purely public charity other than those described in the above four classifications, including those receiving federal funds and all of them receiving state or private funds, are placed in a separate classification and their property remains tax exempt. What rational basis is there for taxing only institutions of purely public charity described in the

above four narrow categories? There simply is no apparent basis.

The Minnesota Supreme Court held that the ". . . legislative classification for tax purposes based on a distinction between government-supported charities with operations of a commercial nature and privately supported charitable institutions is not arbitrary and is reasonably grounded." Appendix A, page A-12. What the opinion fails to explain is why the fact that Rio Vista receives governmental support, or has operations of a commercial nature, or receives no private support, justifies singling out for tax only it and institutions of purely public charity like it.

With respect to its governmental support, the first of the three factors referred to by the Minnesota Supreme Court, the Section 236 and Rent Supplement Programs have already been

discussed at pages 14, 15, 16 and 17, supra. As there pointed out, if the tax is upheld, the burden of the tax will fall upon the tenants. The amount of the subsidy under both the Rent Supplement and Section 236 Programs remains the same regardless of whether the property is taxed.[12] How

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12/ In the Minnesota Supreme Court, appellee argued that appellant could be reimbursed, under 12 U.S.C. § 1715z-1a, for real estate taxes imposed by the State of Minnesota. Subsection 1a(b) provides that financial assistance "may" be made on "an annual basis" to projects meeting the requirements of that section. Subsection 1a(d) sets out six criteria which must be met in order to receive financial assistance. 24 C.F.R. §219.110(c) requires that priority be given to projects presently experiencing financial and management problems. Thus, appellant could be denied assistance because (1) none is then available, or (2) it failed to meet one or more of the six criteria, or (3) there were other organizations with greater financial and management problems. It therefore is by no means certain that appellant can be reimbursed if it must pay real estate taxes.

does receipt of federal funds under the Section 236 and Rent Supplement Programs justify taxing the property of appellant, particularly considering that the result is to place a tax burden on tenants who already are too poor to be able to afford decent housing? The federal subsidies do not provide any funds to pay the tax. They only help the tenants to pay their rent. There simply is no justification for the seemingly irrational result that obtains here, particularly considering that other organizations of purely public charity, including those which receive federal funds, are not taxed.

The second justification cited by the Court is the "commercial nature" of appellant's operations. The Court does not explain what is meant by this term but the court in the earlier Rio Vista decision referred to the rent charges made by appellant and the provision in

its leases that permit eviction of a tenant for nonpayment of rent as reflecting the "commercial nature of the operation" of appellant. 277 N.W.2d 191. Apparently the term is intended to have the same meaning in the instant case.

It certainly is true in the instant case that appellant charges its tenants rent. Indeed, appellant must, as a condition to participating in the Section 236 Program, charge a rent to its tenants that is fixed by the Department of Housing and Urban Development. Appellant can neither set the initial amount of rent nor vary the amount of rent without approval from the Department of Housing and Urban Development. The tenants pay as rent only what their means permit. The parties stipulated that none of the tenants has sufficient means to pay a market rent. All of the tenants receive a subsidy under either

the Section 236 or the Rent Supplement Programs.

It also is true that there is a provision in the leases of appellant that authorizes eviction for nonpayment of rent. The lease form is mandated by HUD and must be used by appellant. Appellant has no discretion to accept or reject any of the lease terms.

How does the charging of rent under the foregoing circumstances, or the provision in the leases of appellant with respect to eviction for nonpayment of rent, justify taxing only the property of appellant and organizations like appellant, and no other institutions of purely public charity? There simply is no connection between the fact that appellant charges a rent which is set by HUD, and the fact that the leases of appellant contain a clause mandated by HUD with respect to eviction for

nonpayment of rent, and the taxation of appellant's property.

Nor does the fact that appellant receives no private cash support, the third factor referred to by the Minnesota Supreme Court, provide a justification.[13] In the instant case, appellant received federal subsidies in excess of $65,000.00 in 1980. It owns 48 units. The attached letter from HUD, Appendix E, page E-2, states that there are 6,910 units throughout the State of Minnesota owned by 97 nonprofit corporations which receive a federal supplement. It is evident that very substantial federal subsidies are

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13/ The argument that the absence of any private support justifies the classification made by the 1980 law is substantially the same as the arguments that a rational basis exists because of the receipt of federal subsidies and tenant rents. An organization that receives substantial support from tenant rents and government supplements likely will receive little, if any, private support.

necessary to provide housing like that made available by appellant. Not only are the amounts substantial, but the period of time over which subsidies are necessary is lengthy. The Section 236 Agreement between appellant and the Department of Housing and Urban Development could last for a 40-year term. No organization would proceed with the substantial costs which are necessary to acquire the land and to construct the rental units without an assurance that funds will be available in addition to tenant rents. It simply is not possible to obtain the large subsidies needed for these kinds of programs from the private sector. By their nature, these programs attract little, if any, private donations. Under the particular circumstances of this case, does the absence of private donations provide a

rational basis for taxing the property owned by appellant? Again, here there is no apparent connection between the absence of private contributions and the taxation of appellant's property.

3. THE EQUAL PROTECTION ISSUE - THE DISPARITY IN TREATMENT

The equal protection clause is violated by a state statute that fails to treat equally persons similarly circumstanced. Thus, in Reed v. Reed, 404 U.S. 71, 77 (1971), the court held that ". . . By providing dissimilar treatment for men and women who are thus similarly situated, the challenged statute violates the Equal Protection Clause . . ." In the instant case, the Minnesota Supreme Court identified three characteristics which separate appellant from other institutions of purely public charity: (1) the financial assistance received from the federal government,

(2) the commercial nature of its operations, and (3) the absence of any private support. Appendix A, page A-12. However, not all institutions of purely public charity having these characteristics are taxed by the 1980 law. An example of the latter kinds of organizations is nursing homes like the nursing home in Assembly Homes v. Yellow Medicine County, 273 Minn. 197, 140 N.W.2d 336 (1966). The nursing home in Assembly Homes received its income from patients, from the Veteran's Administration and from the County Welfare Department. Appellant in the instant case received its support from tenants and from subsidies from the federal government. The level of public support received by the nursing home in Assembly Homes was approximately 75 percent of its total support. The balance of its support was received from residents for

whom Assembly Homes provided services. The level of public support in the instant case was from 40 to 50 percent and the balance was received from tenants. There is no apparent basis for distinguishing the two organizations because of the different levels of support received from these two sources.

Nor is there any basis for distinguishing the two organizations because of the absence of private support. The nursing home in Assembly Homes received no private cash support for the property sought to be taxed. Nor did appellant in the instant case.

Thus, the holding by the Minnesota Supreme Court is erroneous for the further reason that it adopts a classification that taxes only appellant and organizations like it and not other institutions of purely public charity

which are not distinguishable in any relevant respect from appellant.[14]

CONCLUSION

The questions involved in this appeal are substantial. The 1980 law violates the supremacy clause because it singles out for taxation only institutions of purely public charity which do business with the federal government. The decision by the

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14/ The Minnesota Supreme Court, Appendix A, pages A-9 and A-10, stated that the distinction that separates subsidized low income housing from other purely public charities "is perceived by both parties" to be the fact that subsidized housing receives all its support from public funds and tenant rents, while other charities are supported in whole or in part by private donations. This is an erroneous statement of appellant's position. Appellant has consistently maintained throughout this litigation that there is no relevant distinction between it and all of the other institutions of purely public charity which justifies taxing it and not them.

Minnesota Supreme Court to the contrary is in direct conflict with the decision of the Sixth Circuit Court of Appeals in State of Tennessee, supra p. 26. The 1980 law violates the equal protection clause because there is no rational basis for the classification that it makes and because it taxes unequally organizations which are similarly situated in every relevant respect. It will impede the efforts of the federal government to provide decent housing for low income persons by placing a substantial tax burden on them. The Court should note probable jurisdiction of this appeal to resolve these important questions.

Respectfully submitted,

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APPENDIX A

Ramsey County Wahl, J.

Rio Vista Non-Profit Housing Corporation,

Respondent,

C4-82-720 vs.

County of Ramsey,

Appellant.

Endorsed
Filed June 24, 1983
Wayne Tschimperle, Clerk
Minnesota Supreme Court

S Y L L A B U S

1. The classification of subsidized low-income housing developments under Minn. Stat. § 272.02, subd. 1(6) (1982) as institutions of public charity subject to property taxes does not violate the equal protection clause of the federal constitution or the uniformity clause of the Minnesota constitution.

2. Respondent failed to sustain its burden of proof beyond a reasonable

doubt that imposition of property taxes on federally subsidized housing under Minn. Stat. § 272.02, subd. 1(6) violates the supremacy clause of the federal constitution where state-subsidized housing is subject to the same tax.

Reversed.

Heard, considered and decided by the court en banc.

O P I N I O N

WAHL, Justice.

Rio Vista Non-Profit Housing Corporation (Rio Vista), which provides federally subsidized low-income housing, is before this court for a second time challenging Ramsey County's right to assess property taxes against it. On the first appeal, we held that Rio Vista was a purely public charity, exempt from

property taxes under Minn. Stat. § 273.13, subd. 17 (1978)[1] on the basis

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[1] Minn. Stat. § 273.13, subd. 17 (1978) provides;

> A structure situated on real property that is used for housing for the elderly or for low and moderate income families as defined by Title II of the National Housing Act or the Minnesota housing finance agency law of 1971 or regulations promulgated by the agency pursuant thereto and financed by a direct federal loan or federally insured loan or a loan made by the Minnesota housing finance agency pursuant to the provisions of either of said acts and acts amendatory thereof shall, for 15 years from the date of the completion of the original construction or substantial rehabilitation, or for the original term of the loan, be assessed at 20 percent of the market value thereof, provided that the fair market value as determined by the assessor is based on the normal approach to value using normal unrestricted rents.

Subd. 17a provides:

> The provision of subdivision 17 shall apply only to non-profit and limited dividend entities.

of Minn. Stat. § 272.02, subd. 1(6) (1978)[2] and Minn. Const. art. 10, § 1.[3]

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2 Minn. Stat. § 272.02, subd. 1(6) (1978) provides:

> Except as provided in other subdivisions of this section or in section 272.025, all property described in this section to the extent herein limited shall be exempt from taxation:
>
> * * * *
>
> (6) Institutions of purely public charity.

3 Minn. Const. art. 10, § 1 provides in relevant part:

> Section 1. Power of taxation; exemptions; legislative powers * * * Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, but * * * institutions of purely public charity * * * shall be exempt from taxation except as provided in this section * * *. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning.

Rio Vista Non-Profit Housing Corp. v. Ramsey County, 277 N.W.2d 187 (Minn. 1979) (Rio Vista I). In so holding, however, we noted that the question was close and concluded that the state could not impose a tax against property which was not first subject to a general property tax:

> Institutions of purely public charity derive their exemptions from taxation under the provisions of Minn. St. 272.02. According to the language of that section, the tax-exempt status is limited only by the provisions set forth in §§ 272.02 and 272.025. Had the legislature intended to limit or remove the tax-exempt status of the charitable Title II housing, it could have provided such in § 272.02 or § 272.025. By placing the provision for a 20-percent tax on Title II housing in § 273.13, we hold that the tax-exempt status of Rio Vista is unaffected and that the 20-percent tax does not apply to tax-exempt institutions of purely public charity.

Id. at 192 (emphasis added).

The legislature, in apparent response to Rio Vista I, amended Minn. Stat. § 272.02 to exclude low-income, subsidized housing from tax exemption. Minn. Laws 1980, ch. 607, art. II § 6.

> Subdivision 1. Except as provided in other subdivisions of this section or in section 272.025 or section 273.13, subdivisions 17, 17b, 17c or 17d, all property described in this section to the extent herein limited shall be exempt from taxation:
>
> * * * *
>
> (6) Institutions of purely public charity except property assessed pursuant to section 273.13, subdivisions 17, 17b, 17c or 17d;
>
> * * * *

Minn. Stat. § 272.02, subd. 1(6) (1982).

Rio Vista is now suing Ramsey County for recovery of $14,065.36 in property taxes paid in 1981 and seeks a determination that Minn. Stat. § 272.02, subd. 1(6), as amended, violates 1) the equal protection clause of section 1,

Amendment XIV of the United States Constitution and the uniformity clause of section 1, art. 10 of the Minnesota Constitution and 2) the supremacy clause of Clause 2, Art. VI of the United States Constitution. The trial court held the statute unconstitutional on these bases. We reverse

1. Respondent first challenges section 272.02, subd. 1(6) on uniformity clause and equal protection[4] grounds. These challenges are treated as one for purposes of review, as they are equally restrictive of the legislature's power to tax and to classify. Hegenes v. State, 328 N.W.2d 719 (Minn. 1983); In re. McCannel, 301 N.W.2d 910, 916, n. 4 (Minn. 1980).

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4 U.S. Const. amend. XIV, § 1 reads in part:

No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

The legislature has broad discretion in selecting subjects for taxation and in granting tax exemptions. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Where no fundamental right or suspect class is involved, the statute is presumed constitutional, and the burden is on the challenger to prove constitutional violation beyond a reasonable doubt. Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 142 (Minn. 1980). "This court will not disturb the legislative determination unless the classification is clearly arbitrary and has no reasonable basis." In re Taxes on Property of Cold Spring Granite Co., 271 Minn. 460, 466, 136 N.W.2d 782, 787 (1965), quoted in Hegenes v. State, 328 N.W.2d at 721 (emphasis supplied).

We have determined the constitutionality of statutory classifications by

applying the three-pronged analysis of Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979), set out most recently in Hegenes v. State, 328 N.W.2d at 721.

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

(Citations ommitted.)

The distinction that separates subsidized low-income housing from other purely public charities is perceived by both parties to be the fact that sub-

sidized housing receives all its support from public funds and tenants' rents, while other charities are supported in whole or in part by private donations. The legislature has no obligation to, and did not, state its purpose in providing reduced property tax rates for subsidized housing while completely exempting other charities. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959). Various purposes can be attributed to the legislature. The legislation will be sustained as having a rational basis if any conceivable state of facts supports it. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937).

The federal government is contractually committed under the section 236 Federal Housing Program to provide a loan guarantee and mortgage interest

subsidy, and, under the federal Rent Supplement Program, to supplement the rents of eligible low-income tenants. Respondent has not demonstrated receipt of any private support, nor has it demonstrated comparable public commitment to other similarly situated public charities. That burden is on the party challenging the statute. Guilliams, 299 N.W.2d at 140, n. 3, at 141.

Rio Vista's charitable purpose is to offer permanent, low-cost, subsidized housing to low- and moderate-income families for a specified rent payment and security deposit. The charities cited by the trial court as receiving governmental support as well as total exemption from state taxation offer services without regard to the financial circumstances of the recipients and are supported and maintained in part by private donations.

Mayo Foundation v. Commissioner of Revenue, 306 Minn. 25, 236 N.W.2d 767 (1975); Assembly Homes v. Yellow Medicine County, 273 Minn. 197, 140 N.W.2d 336 (1966). The charitable foundation in Worthington Dormitory, Inc. v. Commissioner of Revenue, 292 N.W.2d 276 (Minn. 1980), cited by Rio Vista as an example of a charitable institution receiving full tax exemption, was, as the state points out, supported almost totally by the private sector, even though cash contributions as such accounted for a relatively small part of that support. The legislative classification for tax purposes based on a distinction between government-supported charities with operations of a commercial nature and privately supported charitable institutions is not arbitrary and is reasonably grounded.

We next consider whether the classification is relevant to the purpose of the law, which the state declares is "to provide limited tax relief to a distinct class of charitable institutions while providing full exemption to others." The state has the right to equalize the tax burden to offset tax-related advantages enjoyed by one group over another. United States v. County of Fresno, 429 U.S. 452 (1977). A more even distribution of tax burdens on those permanent residents benefiting from local services at the same time they are enjoying substantial government subsidies is relevant to the revenue-raising purpose of any tax statute. This purpose is consistent with the definition of a tax classification as "a device for fitting tax programs to local needs and usages in order to achieve an equitable

distribution of the tax burden." Madden v. Kentucky, 390 U.S. 83, 88 (1940). The abated rate of tax is a recognition that the legislature wished to provide some measure of relief.

The last factor is that the purpose of the statute must be one which the state can legitimately attempt to achieve. Tax exemption to charities other than schools and churches is by legislative discretion. The legislature and not the courts define property exemptions for nonprofit corporations. Furthermore, we noted in Rio Vista I that, had the legislature intended to limit or remove the tax-exempt status of charitable Title II housing, it could have provided such in section 272.02 or section 272.025. The legislature did just that. The purpose of the statute which tends to limit the public benefits

flowing to any one group in a time of fiscal upheaval is legitimately achievable.

In sum, respondent has not proven beyond a reasonable doubt that Minn. Stat. § 272.02, subd. 1(6) is arbitrary and without any conceivable basis in fact. Although we cannot determine legislative purpose to a certainty, if it is evident that the classification is debatably rationally related to a statutory purpose, the party challenging the statute cannot prevail. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). We hold that a tax classification of residential publicly subsidized housing projects to equalize tax benefits does not violate either the equal protection clause of the federal constitution or the uniformity clause of the Minnesota constitution.

2. The supremacy clause of U.S. Const. Art. VI, cl. 2 proscribes a state tax which is levied upon those who deal with the federal government and not others similarly situated. Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961); Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960). Respondent argues that, although Minn. Stat. § 273.13, subd. 17 levies a 20 percent tax on both federal- and state-subsidized housing, no state-subsidized housing exists, therefore only an entity dealing with the federal government is burdened.[5]

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[5] The Minnesota Housing Finance Agency Law of 1971, codified at Minn. Stat. § 462A.01-.24 (1982), created the Minnesota housing finance agency to aid the financing and construction of low-cost housing.

The response to this argument is threefold. First, the statute by its express terms includes both state and federal housing and is thus nondiscriminatory. "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." Guilliams, 299 N.W.2d at 143, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

Secondly, the trial court, in looking beyond the express terms of the statute, placed the burden of proving the existence of state-subsidized housing on appellant. The challenger, not the state, has the burden of proof of constitutional violation beyond a reasonable doubt. Federal Distillers, Inc. v. State, 304 Minn. 28, 39, 229 N.W.2d 144, 154 (1975), appeal dismissed,

423 U.S. 908 (1975). Respondent has not proved beyond a reasonable doubt that the statute, which is nondiscriminatory by its very terms, is discriminatory in effect.

Finally, Congress anticipated that local property taxes would be levied on federal housing projects.[6] We conclude that respondent has not met its burden of proving a supremacy clause violation in Minn. Stat. § 272.02, subd. 1(6), which equally burdens federal- and state-supported housing.

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6 See 12 U.S.C.A. § 1715z-1a(e)(2) (1980), requiring developers to seek assurances from local officials that property taxes will be no greater than normal for the community, and 12 U.S.C.A. § 1715z-1(f)(3)(A) (repealed by Pub. L. 97-35, §§ 321(f)(3) and 322(f)(7)) and (g), providing for an operating subsidy fund to aid troubled developers faced with increased taxes and maintenance costs.

Reversed with instructions to vacate the order for refund in accordance with this opinion.

APPENDIX B

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

FILE NO: 449838
Subfile: 9

Rio Vista Non-Profit Housing Corporation, Petitioner,	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT
County of Ramsey, Respondent.	

This matter came on for trial before the undersigned on February 11, 1982. The case involved a tax appeal by the petitioner and was heard by the Court without a jury.

The petitioner appeared at said trial by its attorney, Jerome Halloran. The respondent county appeared by its attorney, Janet R. Stenborg. James W. Neher, Special Assistant Attorney

General, appeared on behalf of the Attorney General as an intervenor in this proceedings.

At the trial counsel submitted to the Court certain stipulated facts and requested leave of the Court to file briefs. The Court has now received all the briefs of counsel, and based upon the entire file, records and proceedings herein makes the following conclusion:

FINDINGS OF FACT

At trial certain stipulated facts were submitted to the Court, and the Court in this order is not going to restate those facts but will refer to them as follows: A six-page Stipulation of Facts with Exhibits A through G attached thereto. A one-page Stipulation dated February 18, 1982. A separate one-page Stipulation also dated February

18, 1982. A one-page Stipulation dated February 11, 1982, and a four-page exhibit attached thereto and marked as Exhibit H. All four of the above stipulations were filed of record on March 12, 1982.

CONCLUSIONS OF LAW

1. Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 is unconstitutional, and therefore void and of no effect, because it violates the supremacy clause of Clause 2 of Article VI of the United States Constitution, the equal protection clause of Section 1 of Amendment XIV of the United States Constitution, and the uniformity clause of Section 1 of Article X of the Minnesota Constitution.

2. Petitioner is an institution of purely public charity and it's land and

buildings therefore are exempt from taxation pursuant to Section 272.02, Subd. 1(6) of Minnesota Statutes (1980).

3. Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 does not tax the land of petitioner for the further reason that the land of peitioner was not assessed pursuant to Section 273.13, Subds. 17 through 17d of Minnesota Statutes (1980).

4. Petitioner is entitled to the relief requested in its petition and therefore is entitled to a refund of $15,863.36, together with interest at 6 percent on the amount of $7,931.68 from June 1, 1981 and on the amount of $7,931.68 from November 1, 1981.

5. There is hereto attached an eight-page Memorandum which is made a part of this order.

ORDER FOR JUDGMENT

Therefore, let judgment be entered accordingly.

/s/ J. Jerome Plunkett

J. JEROME PLUNKETT

Judge of District Court

DATED: This 9th day of

April, 1982.

MEMORANDUM

This action was commenced by Rio Vista Non-Profit Housing Corporation (the "petitioner") to recover real estate taxes which were paid by it in 1981 based upon its calim that it is an institution of purely public charity and that Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 is unconstitutional because it violates the supremacy clause of Clause 2 of Article VI of the United States Constitution, the equal protection clause of Section 1 of Amendment XIV of the United States Constitution, and the uniformity clause of Section 1 of Article X of the Minnesota Constitution. In addition to its constitutional arguments, petitioner claims that its land is in any event exempt from payment of property taxes

because Chapter 607, Article II, Section 6 of Laws of Minnesota 1980 taxes only structures and not land.

ISSUES

1. Whether Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 is unconstitutional because it violates the uniformity clause of Section 1 of Article X of the Minnesota Constitution and the equal protection clause of Section 1 of Amendment XIV of the United States Constitution.

2. Whether Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 is unconstitutional because it violates the supremacy clause of Clause 2 of Article VI of the United States Constitution.

3. Whether Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 taxes only the structures owned by

petitioner or whether it taxes both the land and structures owned by petitioner.

THE EQUAL PROTECTION AND UNIFORMITY CLAUSE ISSUE

Petitioner's first argument is that Chapter 607, Article II, Section 6 of Laws of Minnesota for 1980 (the "1980 amendment") is unconstitutional because it violates the uniformity clause of Section 1 of Article X, of the Minnesota Constitution and the equal protection clause of Section 1 of Amendment XIV of the United States Constitution.

Section 1 of Article X of the Minnesota Constitution provides in relevant part that: ". . . Taxes shall be uniform upon the same class of subjects . . " Section 1 of Amendment XIV of the United States Constitution provdes in relevant part that: ". . . No state shall . . . deny to any person

within its jurisdiction the equal protection of the laws."

The uniformity clause of the Minnesota Constitution is not more restrictive than the equal protection clause, Reed v. Bjornson, 191 Minn. 254, 261, 253 N.W. 102, 106 (1934), and a statute which does not violate one of the constitutional provisions, will not be held to have violated the other. Elwell v. County of Hennepin, 301 Minn. 63, 75, 221 N.W.2d 538, 546 (1974).

In Miller Brewing Co. v. State, _____ Minn. _____, 284 N.W.2d 353, 356 (1979) and Lee Guilliams v. Commissioner of Revenue, _____ Minn. ____, 299 N.W.2d 138, 142 (1980), the Minnesota Supreme Court set forth the following three factors to measure a statutory classification against the equal protection and uniformity clause arguments:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

The substance of petitioner's argument is that the distinctions which separate it from other institutions of purely public charity which are not taxed are neither genuine nor substantial. Respondent argues, on the contrary, that the distinctions are both genuine and substantial. The Court agrees with petitioner.

The 1980 amendment taxes only institutions of purely public charity

having property assessed pursuant to Section 273. Subds. 17, 17b, 17c, 17d. The latter subdivisions refer to property that is used for housing for the elderly, for low and moderate income families, or for handicapped persons, and which is financed under a particular governmental program. Further, the parties have stipulated that the only institutions of purely public charity which are taxed by respondent under the 1980 amendment are four organizations which receive an operating subsidy from the federal government under either the rent supplement or a comparable program.[1/]

[1/] There are two federal programs which provide subsidies to petitioner. One is called the Section 236 Program. It is codified at 12 U.S.C.A. § 1715z-1. It is described in paragraphs 9 through 12 of the Findings herein. The second program is called the Rent Supplement Program. It is codified at 12 U.S.C.A. § 1701s and is described in paragraphs 13 through 15 of the Findings herein.

Respondent argues that this narrow classification is justified because of the magnitude of the continuing governmental assistance received by petitioner under the interest reduction and rent supplement programs. Respondent points out that the amount of such assistance to the petitioner has fallen somewhere between 40 to 50 percent of petitioner's gross income in the years 1974 through 1980. Assuming, without deciding, that the magnitude of governmental support is a reasonable basis for making a distinction, the distinction drawn under the 1980 amendment is much more narrow. It does not include all institutions of purely public charity which receive substantial governmental support, but rather only certain kinds of organizations, i.e., those providing housing.

Other organizations which receive comparable governmental support are not taxed.[2/] For example, in Mayo Foundation v. Commissioner Revenue, 306 Minn. 25, 37, 236 N.W.2d 767, 773 (1975), the Mayo Foundation, which received private contributions "as well as substantial grants, from the state and Federal governments", was held to be an institution operated exclusively for

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2/ Respondent also argues that the classification made by the 1980 amendment should be upheld because of the differences which exist between governmentally supported entities and those which receive private support. As pointed out above, the classification made by the 1980 amendment is not between privately supported and governmentally supported institutions of purely public charity.

charitable purposes.[3/] Similarly, in In re Claim of Assembly Homes v. Yellow Medicine County, 273 Minn. 197, 140 N.W.2d 336 (1966), the operating funds of Assembly Homes were obtained from patients, County Welfare Boards, the United States Veterans Administration, and private gifts. Approximately three-fourths of the patients were paid

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3/ The issue in Mayo Foundation was whether the foundation was exempt under §297A.25, Subd. 1(n) as an institution organized and operated exclusively for charitable or educational purposes. The Court said that while entitlement to an exemption under § 297A.25, Subd. 1(n) had not been considered by the Court, the same question had been presented in numerous cases concerning exemption from ad valorem real property and personal property taxes and that, because the language found in the statutes granting exemptions in the property tax cases is nearly identical to the language of the sales tax statute, the reasoning and principles of the prior cases were important. 306 Minn. 32 and 33, 236 N.W.2d 771.

for by County Welfare or the Veterans Administration. 273 Minn. 201. Assembly Homes was held to be an institution of purely public charity. The Court does not believe that there are any genuine or substantial differences between petitioner and other institutions of purely public charity, such as those involved in Mayo Foundation and Assembly Homes, which also receive large amounts of assistance from governmental sources, and it therefore holds that the classification made by the 1980 amendment is void because it violates the uniformity clause of the Minnesota Constitution and the equal protection clause of the Federal Constitution.

That the magnitude of governmental support is not a genuine difference between petitioner and other institutions of purely public charity is further supported by the fact that the records of

respondent do not include the sources from which each of the organizations that are exempt from tax receives its funds, and it therefore is not possible for respondent to determine from its records how much each organization receives as payment for the services which it provides, as grants from other charitable organizations, or as grants from the federal and state governments. The test of whether an exemption is lost because substantial government support is received apparently is applied to no institution of purely public charity other than petitioner.

The respondent also argues that the requirement that tenants of petitioner pay an amount of rent, based upon their income, that a tenant may be evicted for failure to pay rent, and that security deposits are required of each tenant differentiate petitioner from tradition-

al charities. Payment of rent by tenants to the extent that their needs permit enables petitioner to conserve as much of its funds as possible for its charitable purposes. Being able to evict a tenant for nonpayment of rent enables petitioner to have tenants who will pay the rent which petitioner must have to meet its operating expenses. The security deposit of the tenant must, under paragraph 15 of the lease, be returned to the tenant, except for damage caused by him or for any rent delinquency. The Court believes that the foregoing are reasonable requirements imposed by petitioner in an effort to manage its properties, and to carry out its charitable purposes, as effectively as possible and are not a basis for taxing the properties of organizations like petitioner and no other institutions of purely public charity.

THE SUPREMACY CLAUSE ISSUE

The parties have stipulated that the reason for passage of the 1980 amendment was to tax only the properties of petitioner and other similar organizations. Respondent has taxed only four organizations under the 1980 amendment, all of which, like petitioner, provide housing for low and moderate income persons and receive a subsidy from the federal government. The Court agrees with petitioner that the classification made by the 1980 amendment conflicts with the supremacy clause of Clause 2 of Article VI of the United States Constitution and therefore is defective.

Clause 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Petitioner relies upon Phillips Co. v. Dumas School District, 361 U.S. 376 (1960) and Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961). In Phillips Co. real property was leased by Phillips Chemical Co. from the United States under a lease which provided for termination of the lease at the option of the United States. The property was taxed under Article 5248 of Texas Statutes which permitted taxation of real property owned by the United States that was used and occupied by a private party. The property would have been exempt from tax under Article 7173 of Texas Statutes had the State of Texas been the lessor rather than the federal government. The Court held that Article 5248 discriminated unconstitutionally

against the United States and those with whom it deals. The Court said at 376 U.S. 387:

> None of these arguments, urged in support of the Texas classification, seems adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Here, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases, using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The difference between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follws that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of M'Culloch v. Maryland, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See United States v. City of Detroit, supra, at 473. Therefore, this tax may not be exacted.

In Moses Lake Homes, respondent Grant County attempted to tax the full value of the buildings and improvements on privately-owned leaseholds of public housing developments on a federally-owned air base but taxed other leaseholds, including privately-owned leaseholds of tax-exempt state lands, at a lower valuation. The Court held the tax unconstitutional and void because it discriminated against the United States and its lessees. "If anything is settled in the law, it is that a state may not discriminate against the federal government or its lessees" . . . 365 U.S. at 751.

Respondent argues that the Phillips Co. and Moses Lake Homes cases are not applicable because the 1980 amendment applies equally to low and moderate income housing subsidized by either the federal government or the

State of Minnesota. The difficulty with respondent's argument is that there is no state subsidized housing taxed by respondent under the 1980 amendment, nor, as the parties have stipulated, was it the intent that any state subsidized housing be taxed under that amendment. There are no state statutes comparable to 12 U.S.C.A. Section 1715z-1, which provides for the Section 236 Program, and 12 U.S.C.A. Section 1701s, which provides for the Rent Supplement Program. Petitioner is not treated on an even basis with state subsidized institutions of purely public charity providing decent housing because there are none of the latter. Even if there were such institutions of purely public charity, respondent would not be able to identify them. The parties have stipulated that the records of respondent do not show the sources from which each institution of

purely public charity receives its support. Notwithstanding its argument that the 1980 amendment applies equally to state subsidized and federal subsidized organizations, respondent is unable to tell from its records whether there are any institutions of purely public charity which receive a state subsidy.

Under the Phillips Co. and Moses Lake Homes decisions, a state statute may not unfairly discriminate against organizations with which the federal government does business. That is exactly what the 1980 amendment was intended to do and that is, in fact, exactly what the 1980 amendment does. Only institutions of purely public charity which provide housing and which receive a federal subsidy were intended to be taxed and only they are taxed. The Court accordingly holds that the 1980

amendment is void because it also violates the supremacy clause of Clause 2 of Article VI of the United States Constitution.

THE STATUTORY INTERPRETATION ISSUE

Section 272.02, Subd. 1(6) of Minnesota Statutes, as amended by the 1980 amendment, exempts from taxation the property of institutions of purely public charity other than property assessed pursuant to Section 273.13, Subds. 17, 17b, 17c, or 17d. The parties have stipulated that petitioner's land was classified and taxed pursuant to Section 273.13, Subd. 19, of Minnesota Statutes. The land of petitioner, not having been assessed pursuant to Section 273.13, Subds. 17 through 17d, was not affected by passage of the 1980 amendment. It therefore remains exempt under Section 272.02, Subd. 1(6), as it was prior to passage of the 1980 amendment, because

it is owned by an institution of purely public charity.

Respondent argues that it was the intent of the 1980 amendment to tax both the land and the structures of petitioner. However, as pointed out in the foregoing paragraph, the 1980 amendment clearly does not do that. A statute which is clear and unambiguous must be applied by the courts as it reads. Section 645.16 of Minnesota Statutes (1980); Rice v. City of St. Paul, 208 Minn. 509, 519, 295 N.W. 529, 533 and 534 (1940); Minneapolis-St. Paul Sanitary District v. City of St. Paul, 240 Minn. 434, 436; 61 N.W.2d 533, 535 and 536 (1953); In re Election upon Amendment No. 17, 256 Minn. 581, 586, 99 N.W. 2d 468, 471 and 472 (1959). Therefore, the clear and unambiguous language of the 1980 amendment forecloses any consideration of legislative intent.

APPENDIX C

(Petition Denied)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.
August 10, 1983

Rio Vista Non-Profit Housing Corporation,
Respondent,

C4-82-720 vs.

County of Ramsey,
Appellant.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

IT IS FURTHER ORDERED that no attorneys fees are allowed pursuant to Rule

140, Rules of Civil Appellate Procedure.

Yours respectfully,

WAYNE TSCHIMPERLE
Clerk Supreme Court

[Office of Appellate Courts
Filed August 10, 1983
Wayne Tschimperle, Clerk]

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

Rio Vista Non-Profit Housing Corporation, Respondent.	)	No. 82-720
v.	)	
County of Ramsey, Appellant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Rio Vista Non-Profit Housing Corporation, the respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota entered on August 10, 1983 in the above matter.

This appeal is taken pursuant to 28 U.S.C., § 1257(2).

/s/ Jerome Halloran
Jerome Halloran
Counsel for Respondent

Doherty, Rumble & Butler
Professional Association
E-1500 First National
Bank Building
Saint Paul, Minnesota 55101
Telephone: (612) 291-9333

[Notice of Appeal Received 10-5-83 by Larry Dease. Clerk of Appellate Courts, 230 State Capitol, St. Paul, Minnesota 55155]

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE BY MAIL

Janet E. Gornick, being first duly sworn, deposes and says that on October 5, 1983, she served the attached Notice of Appeal upon Miss Janet R. Stenborg and Mr. James W. Neher, attorneys for County of Ramsey, appellant, by placing a true and correct copy thereof in an envelope addressed to each attorney as follows:

Miss Janet R. Stenborg
Assistant Ramsey County Attorney
200 Lowry Square
Saint Paul, Minnesota 55102

Mr. James W. Neher
Special Assistant Attorney General
Minnesota Department of Revenue
Centennial Office Building
Saint Paul, Minnesota 55145

(which is the last known address of each attorney) and depositing the same, with postage prepaid, in the United States mails at St. Paul, Minnesota.

/s/ Janet E. Gornick

Subscribed and sworn to before me
this 5th day of October, 1983.

/s/ Sandra A. Yanez
Sandra A. Yanez
Notary Public, Minnesota
Ramsey County
My commission expires Aug. 27, 1988

291-9290

October 20, 1983

Clerk of District Court
Ramsey County Court House
Saint Paul, Minnesota 55101

Re: Rio Vista Non-Profit Housing Corporation vs. County of Ramsey; File No. 82-720; District Court File No. 449838; Subfile 9

Dear Sir or Madam:

We are the attorneys for Rio Vista Non-Profit Housing Corporation in the above matter. We have filed a Notice of Appeal with the Clerk of the Minnesota Supreme Court from the judgment of the Minnesota Supreme Court entered on August 10, in the above matter. Rule 10.3 of the Rules of the Supreme Court of the United States requires that a copy of the Notice of Appeal be filed with the court possessed of the record. We have been advised by the Clerk of the Minnesota Supreme Court that the record has been returned to your office. We therefore are filing a copy of the Notice of Appeal with you.

Very truly yours,

DOHERTY, RUMBLE & BUTLER
PROFESSIONAL ASSOCIATION

By /s/ Jerome Halloran

JH:jg
Enc.

Receipt of a copy of the Notice of Appeal to the Supreme Court of the United States in the above matter is acknowledged this 20th day of October, 1983.

/s/ Claire Kimmel, Deputy

Appendix E

Mr. Jerome Halloran
Doherty, Rumble & Butler
1500 First National Bank Bldg.
St. Paul, MN 55101

Dear Mr. Halloran:

Subject: Freedom of Information Request #740 and your letter dated October 14, 1983.

In response to your October 14, 1983 letter to this office, we provide the following:

1. There are 97 non-profit HUD Held/Insured projects in Minnesota with at least one of the following subsidies: Section 8, Rent Supplement, or Section 236 Subsidy. Our count is slightly less than you had estimated due to our removal of the unsubsidized projects from the list that you had submitted to us. We have attached your list (with our updates) to this letter.

2. The number of rental units in the above referenced 97 projects totals 6,910.

If you have any questions, please call Jeff Gagnier at (612) 349-3082.

Sincerely,

Robert B. Gerber
Deputy Manager, SD

APPENDIX F

UNITED STATES of America

v.

STATE OF TENNESSEE, City of Oak Ridge, Tennessee, and Martha B. Olsen, Commissioner of Revenue, State of Tennessee.

Civ. No. 3-81-458.
United States District Court,
E. D. Tennessee, N. D.
December 31, 1981.

United States sought declaration that Tennessee privilege tax on production of enriched uranium infringed the Government's immunity from state and local taxation. Plaintiff moved for summary judgment. The District Court, Robert L. Taylor, J., held that: (1) although tax was assessed against contractor which operated the government facility, the government was the proper party to sue, and (2) tax infringed the United States' immunity as tax applied only to the government contractor, notwithstanding that it would also apply to

any privately owned facility for enrichment of uranium.

Summary judgment for plaintiff.

1. Declaratory Judgment - 304

Although taxes assessed under Tennessee statute on production of enriched uranium were assessed against private contractor which operated Government's facility for enrichment of uranium the United States was proper party to seek declaration that the tax infringed on the federal Government's immunity from state and local taxation and any right of contractor to be free from taxation was a derivative one. T.C.A. §§ 67-6201 et seq., 67-6202; Atomic Energy Act of 1954, § 41(b), 42 U.S.C.A. § 2061(b); U.S.C.A. Const. Art. 6, cl. 2.

2. Taxation - 1207

Tennessee privilege tax imposed on

government contractor which operated Oak Ridge Gaseous Diffusion Plant infringed on the United States' immunity from state and local taxation as only the contractor was subject to the tax, notwithstanding that tax applied to any entity which engaged in uranium enrichment or contention that political pressure to prevent abusive state tax would be applied by potential private investors in uranium enrichment plants and through Tennessee's desire to keep the facility in the state. T.C.A. §§ 67-6201 et seq., 67-6202; Atomic Energy Act of 1954, §§ 41 (a, b), 42 U.S.C.A. §§ 2061 (a, b); U.S.C.A. Const. Art. 6, cl. 2.

Thomas Dillard, U. S. Atty., Knoxville, Tenn., John F. Murray, John J. McCarthy, Charles E. Stratton, Attys., Tax Division, U. S. Dept. of Justice, Washington, D. C., for plaintiff.

Ronald N. Murch, William E. Lantrip, Attys. at Law, Oak Ridge, Tenn., for City of Oak Ridge.

Jim G. Creecy, Charles Lewis, Attys. at Law, Nashville, Tenn., for State of Tennessee and Olsen.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

The United States brought this action to obtain a declaratory judgment that taxes assessed under a Tennessee statute upon the production of enriched uranium from the Government's contractor, Union Carbide, infringes upon the immunity of the United States from state and local taxation in violation of the Constitution. The parties have filed a stipulation of facts and upon those facts have moved for a summary judgment. The parties have briefed the issues and argued their positions before the Court.

The Tennessee General Assembly enacted Chapter 206 of the Public Acts of 1981, now Tenn. Code Ann. §67-6201 et seq., effective July 1, 1981. Section 3 of the statute provides:

> The production by any person in connection with any business for profit, regardless of the form of such profit, of special nuclear material is declared to be a taxable privilege upon which each county and/or municipality in which the special nuclear material is produced may levy such privilege tax by resolution or ordinance of the legislative body in accordance with the provisions of this act. Every person exercising such privilege shall be liable for the tax, whether such person's possession of such special nuclear material for purposes of production is by virtue

of such person's ownership thereof or is pursuant to a lease, contract, license, loan or otherwise.

Section 2 defines "separative work units" as:

> The measure of effort expended to separate a given quantity of uranium (feed material) into two fractions, one a product fraction containing a higher concentration of U-235 than the feed material and the other, a tails fraction, containing a lower concentration of U-235.

By Resolution No. 6-45-81, dated June 1, 1981, the City of Oak Ridge, Tennessee levied the tax as authorized by the statute.

There exist today in the United States only three facilities for the enrichment of uranium whose effort can be measured in separative work units:

(a) The Oak Ridge Gaseous Diffusion Plant located in Oak Ridge, Tennessee, and operated for the United States by Union Carbide Corporation.

(b) The Paducah Gaseous Diffusion Plant located in Paducah, Kentucky, and operated for the United States by Union Carbide Corporation.

(c) The Portsmouth Gaseous Diffusion Plant located near Portsmouth, Ohio, and operated for the United States by Goodyear Atomic Corporation.

A fourth facility for the enrichment of uranium is under construction in Ohio and is owned exclusively by the United States. No other facilities for the enrichment of uranium exist in the United States. Under Section 41(a) of the Atomic Energy Act of 1954, 42

U.S.C. § 2061(a), privately-owned facilities for the enrichment of uranium may be built. However, no such private uranium enrichment facility has ever been built in the United States, nor are any applications pending for licenses to do so. From time to time proposals by private entities have been advanced for building private uranium enrichment facilities outside of Tennessee, but none of these proposals have ever come to fruition or is currently pending. Presently, there are no known plans for construction and operation of any facility for the enrichment of uranium in Tennessee, either privately-owned or Government-owned.

All three current uranium enrichment facilities are owned exclusively by the United States and operated by private companies under contract. The Oak Ridge Gaseous Diffusion Plant is the only such

facility in Tennessee. It is, therefore, the only entity subject to the tax which is the subject of this action.

The Oak Ridge Plant is operated for the United States by Union Carbide Corporation (Union Carbide) pursuant to Contract No. W-7405-ENG-26 (Contract) with the Department of Energy (DOE). The Contract defines and controls all activities performed by Union Carbide at the facility. It performs no work except that performed under the Contract. Decisions as to the quantity of enriched uranium to be produced at any given time and decisions as to assay (the degree to which a quantity of uranium is enriched) are made by DOE and periodically communicated to Union Carbide. The Oak Ridge Plant, including all equipment and other personal property, belongs to the United States. The personnel who operate the plant on a daily basis are those of

Union Carbide Corporation. The uranium which is enriched at the plant arrives and leaves in containers belonging to the domestic and foreign customers which use the uranium for commercial purposes. While the uranium is at the Oak Ridge Plant, pursuant to contract, it is the property of the United States.

In return for operating the Oak Ridge Plant and certain other Government-owned facilities, Union Carbide receives an annual fixed fee, payable in equal monthly installments. No funds of Union Carbide are involved in the operation of the Oak Ridge Plant. All costs for operation of the Oak Ridge Plant are paid from a special bank account maintained in the name of Union Carbide, which account is funded by a Letter of Credit issued by the Federal Reserve Bank of Atlanta in the amount of the total contract funds available. The

unused balance of the Letter of Credit remains available until the bank is advised in writing by the Treasury Department of the United States that the Letter of Credit has been revoked. Title to the funds remains in the United States until disbursed by Union Carbide in payment of contract costs. Title to the funds never rests in Union Carbide.

The enriched uranium produced at the Oak Ridge Plant is sold directly by DOE to domestic and foreign customers for nuclear-powered electric generating plants. Union Carbide is not a party to such contracts nor is its annual fixed fee related in any way to revenue earned by DOE from the enrichment of uranium.

Plaintiff has moved for summary judgment on the ground that the tax in question discriminates against the United States and its contractors and because the tax is imposed upon an

exclusive federal activity, both in violation of the Supremacy Clause. Defendants deny that the tax is unconstitutional and contend that the Government lacks standing to maintain this action.

[1] Initially, we address the issue of standing. Defendants contend that Union Carbide is the proper party to bring suit since it is the entity which was taxed. We disagree. This is an action to establish and protect the sovereign rights of the United States. The United States is, therefore, the proper party to bring this action. United States v. State of Colorado, 627 F.2d 217, 219 (10th Cir. 1980); United States v. Nevada Tax Commission, 439 F. 2d 435, 438-39 (9th Cir. 1971). Any right of Union Carbide to be free from taxation is a derivative one. United States v. Bureau of Revenue of New

Mexico, 291 F.2d 677, 679 (10th Cir. 1961).

We turn now to the merits of the case. Defendants rely on Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941), and subsequent cases, particularly United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964), to support their contention that the tax does not violate the Supremacy Clause. In King & Boozer, a Government contractor purchased lumber for use in constructing an army camp. By contract the government was required to pay the contractor's costs plus a fixed fee. Thus, a state excise tax levied on the purchase was passed on to the Government. The court upheld the tax, holding that under the terms of the contract the contractor was the purchaser of the lumber and did not act as an agent of the government. This case established

that it is permissible for the Government to bear the economic burden of a state tax.

Boyd involves an assessment by the State of Tennessee against the Government's Oak Ridge facility. There the State imposed a contractor's use tax on Union Carbide and H. K. Ferguson Co., each of which had cost-plus fixed fee contract with the Atomic Energy Commission for work and services to be performed at Oak Ridge. Under the contracts purchases were made with Government funds and title to all materials passed directly from the vendors to the Government. The use tax was levied upon contractors using property in performance of their contracts, irrespective of the ownership of the property. The tax was measured by the purchase price or fair market value of the property. The Court held that the

use of government-owned property by a federal contractor to perform a profitable contract was a separate taxable activity which gave it "a separate taxable interest." 378 U.S. at 44-45, 84 S.Ct. at 1521-1522. Because the Court concluded that the companies were not agents or instrumentalities of the Government, their separate interests were held to be taxable. 378 U.S. at 48, 84 S.Ct. at 1524.

All parties rely on United States v. County of Fresno, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977), and assert that its holding supports their respective positions. There the Court upheld a California statute which authorized counties to tax possessory interests in improvements on tax-exempt land. Pursuant to the statute the Counties of Fresno and Tuolumne imposed such a tax on United States Forest Service employ-

ees who lived in federally owned houses in the national forests located in those counties. The counties calculated the tax based on the annual estimated fair rental value of the houses, discounted by any disadvantages of location and the absence of any customary amenities. Essentially the same factors were considered by the Forest Service in calculating a deduction from the salaries of employees who occupied the dwellings.

The Court began its analysis with the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819), and explained that Maryland's tax on the Bank of the United States was held to be invalid because no similar tax was imposed on other banks. The Court noted that the power to tax may be exercised to destroy. The Court stated further that

the political check against abuse of the power to tax a State's constituents is absent when the State taxes only a federal function. A State's constituents can be relied on to vote out of office any legislature that imposed an abusively high tax on them. They cannot be relied upon to be similarly motivated when the tax is instead solely on a federal function. [Footnote omitted].

429 U.S. at 458-59, 97 S.Ct. at 702-703. The Court continued as follows:

The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally

> on the other similarly situated constituents of the State. [Footnote omitted].

429 U.S. at 462, 97 S.Ct. at 704-705. The Court held the possessory interest tax to be valid since other similarly situated taxpayers were subject to a tax. 429 U.S. at 465, 97 S.Ct. at 706.

[2] Defendants contend that Boyd controls this case because the contract which the Court scrutinized is essentially the same contract as is now before the Court. Boyd clearly holds that a State may tax the beneficial use of federally-owned property by a federal contractor, even though the tax is measured by the value of the Government's property. Accord: United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958). This is what defendants have attempted to do in this case. We cannot agree, however,

that Boyd controls this case. Although the contract has remained essentially the same, the surrounding facts have changed. The tax in Boyd applied to all contractors in the State. The taxation scheme in this case is directed at one taxpayer, Union Carbide, a federal contractor. In the opinion of the Court, this is the kind of discrimination which is prohibited by McCulloch. The United States Court of Appeals for the Ninth Circuit struck down a similar statute in United States v. State of Washington, 654 F.2d 570 (9th Cir. 1981). At issue were sales and use taxes which applied only to federal contractors. The court stressed that such a tax has the potential of interfering with the functions of the federal government and that there was no similarly situated group of taxpayers to provide a political check on the State's taxing power. These consi-

derations apply with equal force in this case. The State's contentions that political pressure to prevent an abusive state tax will be applied by potential private investors in uranium enrichment plants and through the State's desire to keep the facility at Oak Ridge are without merit. We agree with the Ninth Circuit that

> Only when those similarly situated not dealing with the federal government feel the same tax burden as those dealing with it, can the State's constituency be relied upon to ensure that the taxation does not rise to abusive levels.

654 F.2d at 577. Potential investors cannot be relied upon to protect the interests of the United States.

Defendants maintain that the tax is broad enough to apply to other entities which now or in the future enrich uran-

ium and that it is inconsequential that at present the Oak Ridge Plant is the only entity taxed. They contend that the tax would be invalid "only if it was imposed under its own terminology against the enrichment of uranium by contractors of the federal government and no others." (Brief for Defendants at 11). This argument ignores the practical application of this statute. The Court must look "through form and behind labels to substance." City of Detroit v. Murray Corp., 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 913 (1958). When this is done, we find that the Oak Ridge Plant, which is producing special nuclear material as directed by Congress, 42 U.S.C. § 2061(b), is burdened with a tax which no other entity in the State must pay. This, in the opinion of the Court, is contrary to the Supremacy Clause of the Constitution.

For these reasons, plaintiff is entitled to summary judgment. It is, therefore, ORDERED that judgment enter declaring that the tax on the production of enriched uranium is unconstitutional as applied to the government's contractor, Union Carbide. It is further ORDERED that defendants' motions for summary judgment be, and the same hereby are, denied.

Order Accordingly.

APPENDIX G

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STATE OF TENNESSEE, CITY OF OAK RIDGE, MARTHA B. OLSEN, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
Defendants-Appellants.

No. 82-5108 n
n NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Slip Opinion

March 28, 1983

OPINION:

Before: ENGEL, Circuit Judge; WEICK, Senior Circuit Judge; and BALLANTINE, District Judge *

* Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

ORDER

The State of Tennessee, the City of Oak Ridge, Tennessee, and Martha B. Olsen, Tennessee Commissioner of Revenue, appeal from a declaratory judgment of the United States Court for the Eastern District of Tennessee that a state tax provision, Tenn. Code Ann. § 67-6201 et seq., is unconstitutional. This state statute allows local communities to levy a tax on producers of enriched uranium. When Oak Ridge sought to exercise this local option excise tax against Union (sic) Carbide Corp., a federal contractor producing enriched uranium, the United States instituted this suit to obtain a declaratory judgment that taxes levied against Union Carbide infringed on the United States' immunity from state and local taxation in violation of the Supremacy Clause of the United States Constitution. The United States district

judge below granted summary judgment in favor of the United States, holding that this tax on the production of enriched uranium was unconstitutional as applied to the federal contractor, Union Carbide Corp. This appeal followed.

The facts in this case are not disputed and are easily summarized. The Oak Ridge Gaseous Diffusion Plant located in Oak Ridge, Tennessee is one of only three facilities producing enriched uranium in the United States. All three facilities are owned by the United States and all are operated by private companies. Since its acquisition by the United States in 1943, the Oak Ridge plant's operations have been managed by Union (sic) Carbide Corp. pursuant to Government Contract No. W-7405-ENG-26.

The contract between the United States and Uniion (sic) Carbide defines and controls all activities performed by

Union Carbide at the Oak Ridge plant. The United States sets production decisions regarding the quantity and quality of enriched uranium to be produced, and through the United States Department of Energy the United States sells the enriched uranium directly to foreign and domestic customers. Union Carbide is not a party to contracts between the United States and its enriched uranium customers. Although Union Carbide personnel operate the Oak Ridge facility, the plant, plant equipment, and the uranium itself are the property of the United States.

No funds of Union Carbide are involved in the operation of the Oak Ridge plant. In return for operating the plant, Union Carbide receives an annual fixed fee. Union Carbide's fee is not related in any way to the revenue earned by the United States from its sale of enriched uranium. Costs of operating the

plant are paid from a special bank account maintained in Union Carbide's name by the Federal Reserve Bank of Atlanta.

Appellants raise two issues on appeal. They first argue that the Tennessee tax on the production of enriched uranium does not tax a function of the federal government in violation of the Supremacy Clause. In addition, appellants argue that the Tennessee tax does not discriminate against the United States and contractors of the United States in violation of the Supremacy Clause.

After reviewing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and other Supreme Court and circuit court decisions, see e.g., United States v. County of Fresno, 429 U.S. 452 (1977), United States v. Boyd, 378 U.S. 39 (1964), Alabama v. King & Boozer, 314

U.S. 1 (1941), United States v. State of Washington, 654 F.2d 570 (9th Cir. 1981), United States District Judge Robert Taylor, in a careful opinion, rejected defendants' assertion that the tax at issue was broad enough to apply to entities other than federal contractors. Judge Taylor observed that this argument ignores the practical application of the statute which in fact burdens only the federal government by imposing a tax solely upon government property. Upon the record before the district court, we agree that the tax imposed contravenes the Supremacy Clause of the Constitution. Accordingly,

For the reasons set forth by Judge Taylor in his memorandum opinion filed in the district court December 31, 1981,

IT IS ORDERED that the judgment of the district court is affirmed.

APPENDIX H

291-9290

May 19, 1983

Mr. Wayne O. Tschimperle
Clerk of Supreme Court
Room 230
State Capitol Building
Saint Paul, Minnesota 55155

Re: Rio Vista Non-Profit Housing Corporation, Respondent, v. County of Ramsey, Appellant; File No. 82-720

Dear Mr. Tschimperle:

We are the attorneys for respondent in the above matter. Briefs have been filed and oral argument took place on January 5, 1983. I learned this week of a decision by the Circuit Court of Appeals for the Sixth Circuit that affirms a District Court decision involving an issue similar to one of the issues in the instant case. The case is United States v. State of Tennessee. I attach copies of both the District Court

decision and the decision by the Court of Appeals for the Sixth Circuit.

In the instant case, we argued that the statute involved violates the supremacy clause of the United States Constitution because only institutions of purely public charity which receive federal funds are taxed. See Respondent's Brief, beginning on page 17. Appellant argued in its brief that the statute is not defective because the statute is sufficiently broad to include both state-funded as well as federally-funded institutions of purely public charity and the fact that no state-funded institutions of purely public charity are taxed is not important. See Appellant's Brief at the top of page 27 and the final paragraph on page 29.

The District Court in United States v. State of Tennessee, at 531 F.Supp., page 66, refers to the argument

by the defendants in that case that the tax is broad enough to apply to other entities and that it is inconsequential that only one entity was taxed under the statute. The District Court rejected that argument and held that the supremacy clause was violated because no other entity in the state had been burdened with the tax. This holding directly supports the argument of respondent in the instant case. Only respondent, and other institutions of purely public charity which, like respondent, are able to provide decent housing because of federal subsidies, are taxed. No other institutions of purely public charity are taxed.

I enclose 20 additional copies of this letter together with 20 additional copies of the District Court decision and the decision by the Court of Appeals for the Sixth Circuit. I also am

sending copies of this letter and of the Court decisions to Miss Stenborg and Mr. Neher.

Very truly yours,

DOHERTY, RUMBLE & BUTLER
PROFESSIONAL ASSOCIATION

By

JH:jg

Encs.

cc: Miss Janet R. Stenborg
Mr. James W. Neher

NO. 82-720

STATE OF MINNESOTA

IN SUPREME COURT

- -

Rio Vista Non-Profit
Housing Corporation,

Respondent,

vs.

RESPONDENT'S
PETITION FOR
REHEARING

County of Ramsey,

Appellant.

- -

JEROME HALLORAN
Doherty, Rumble & Butler
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E-1500
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Saint Paul, Minnesota 55101
Telephone: (612) 291-9333

ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR APPELLANT

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APPENDIX

United States v.
State of Tennessee
531 F.Supp. 62
(E.D. Tenn. 1981) A-1

United States v.
State of Tennessee
_____ F.2d _____
(6th Cir. March 28,
1983) B-1

Respondent is filing this Petition to request a rehearing by the Court of its holdings that the 1980 law[1] violates neither the Equal Protection nor the Supremacy Clauses. With regard to the Supremacy Clause issue, the basis for this Petition is that the decision in the instant case omits consideration of a controlling case. With regard to the Equal Protection issue, the basis for this Petition is that Respondent under the classification adopted by the Court is not treated equally because other organizations which come within the classification are not taxed.

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[1]The statute involved in this case is that enacted by Chapter 607, Article 11, Section 6 of laws of Minnesota for 1980. It was referred to as "the 1980 law" in Respondent's brief to this Court and will be so referred to in this Petition.

THE SUPREMACY CLAUSE ISSUE

The case that the Court failed to consider in its opinion is United States v. State of Tennessee, _____ Fed.2d _____, (6th Cir., March 28, 1983), affirming 531 F.Supp. 62 (E.D. Tenn. 1981)[2]. This case involved a tax levied by the City of Oak Ridge, Tennessee pursuant to a Tennessee statute that provided in part as follows:

> The production by any person in connection with any business for profit, regardless of the form of such profit, of special nuclear material is declared to be a taxable privilege upon which each county and/or municipality in which the special nuclear material is produced may levy such privilege tax by resolution or ordinance of the legislative body in accordance with the provisions of this act. Every person exercising such privilege shall be liable for the tax, whether such person's

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[2]Copies of the decision by the District Court and the Circuit Court of Appeals are attached hereto, marked Appendix A and Appendix B.

> possession of such special nuclear material for purposes of production is by virtue of such person's ownership thereof or is pursuant to a lease, contract, license, loan or otherwise.

In the entire United States, there were only three facilities which operated the kind of business taxed under the above Statute. One of the facilities was in the State of Tennessee and only it was taxed by the tax levied by the City of Oak Ridge. The other two facilities were in the States of Kentucky and Ohio. All three of the facilities were owned by the federal government and were operated under contract with private companies. A fourth facility was under construction in Ohio and was owned exclusively by the United States. No other facilities for the enrichment of uranium existed in the United States. Authority existed for privately-owned facilities, but no such facility had ever been built in the

United States nor were there any applications pending for licenses to do so. At the time of the District Court's decision, there were no known plans for construction or operation of any facility for the enrichment of uranium in Tennessee, either privately-owned or government-owned.

The United States argued that the Tennessee Statute discriminated against the United States and its contractors because only the one facility was taxed. With regard to the State's argument in reply that the Statute was sufficiently broad to apply to all contractors, notwithstanding that only the one facility was taxed, the District Court said

> Defendants maintain that the tax is broad enough to apply to other entities which now or in the future enrich uranium and that it is inconsequential that at present the Oak Ridge Plant is the only entity taxed. They

> contend that the tax would be invalid "only if it was imposed under its own terminology against the enrichment of uranium by contractors of the federal government and no others." (Brief for Defendants at 11). This argument ignores the practical application of this statute. The Court must look "through form and behind labels to substance." City of Detroit v. Murray Corp., 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 913 (1958). When this is done, we find that the Oak Ridge Plant, which is producing special nuclear material as directed by Congress, 42 U.S.C. § 2061(b), is burdened with a tax which no other entity in the State must pay. This, in the opinion of the Court, is contrary to the Supremacy Clause of the Constitution. 531 F.Supp., p. 66.

The District Court decision in State of Tennessee was affirmed by the Court of Appeals for the Sixth Circuit. The latter Court said

> After reviewing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and other Supreme Court and circuit court decisions, see e.g., United States v. County of Fresno, 429 U.S. 452 (1977), United States v.

> Boyd, 378 U.S. 39 (1964), Alabama v. King & Boozer, 314 U.S. 1 (1941), United States v. State of Washington, 654 F.2d 570 (9th Cir. 1981), United States District Judge Robert Taylor, in a careful opinion, rejected defendants' assertion that the tax at issue was broad enough to apply to entities other than federal contractors. Judge Taylor observed that this argument ignores the practical application of the statute which in fact burdens only the federal government by imposing a tax solely upon government property. . Upon the record before the district court, we agree that the tax imposed contravenes the Supremacy Clause of the Constitution.

Respondent learned of the State of Tennessee decision in May and immediately sent, on May 19, 1983, copies of the District Court and Sixth Circuit decisions to the Court and to counsel for Appellant. Counsel for Appellant did not respond to Respondent's letter and there is no reference to the case in the Court's opinion.

In the instant case it is undisputed that the only institutions of purely public charity taxed are organizations like Respondent which receive a federal subsidy. The parties have stipulated that only four organizations have been taxed by Appellant under the 1980 law (paragraph 24 of the Stipulation, p. A-10 of the Appendix to Appellant's brief); that all of the four taxed organizations provide housing for low income tenants and receive an operating subsidy from the federal government (paragraph 25 of the Stipulation, p. A-11 of the Appendix); and that none of the properties owned by other institutions of purely public charity have been taxed (paragraph 25 of the Stipulation, p. A-11 of the Appendix). Notwithstanding this clear stipulation between the parties that only Respondent and three other like organizations are taxed by the 1980 law,

the Court has held that Respondent has failed to meet its burden of proof. It is clear that the Court in arriving at this holding, gave great weight to the fact that the 1980 law, by its terms, taxes both federal and state subsidized housing. On page 9 of its opinion, the Court states that the response to the argument of Respondent is three-fold, one of which is that "the statute by its express terms includes both state and federal housing and is thus not discriminatory". On page 10, in the second of its three responses, the Court states that Respondent has not proved beyond a reasonable doubt that the statute "which is non-discriminatory by its very terms" is discriminatory in effect. And, finally, also on page 10, the Court concludes that Respondent has not met its burden of proving a Supremacy Clause violation in Minn. Stat. § 272.02, subd.

1(6), "which equally burdens federal- and state-supported housing".[3] The State of Tennessee case is directly contrary to the holding in the instant case. Appellant has not cited any authority contrary to the State of Tennessee case, nor does the Court cite any in its opinion. Respondent requests that the instant case be reheard in light of this very recent decision and that the Court give each of the parties an opportunity to file a brief in support of its position if the Court believes that would be helpful to it in disposing of this matter upon rehearing.

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[3]The Court's third response is that Congress anticipated that local property taxes would be levied on federal housing projects. It is not Respondent's argument that under no circumstances may its property be taxed but rather that its property be taxed in a constitutionally permissable manner. Certainly Congress did not intend otherwise.

THE EQUAL PROTECTION ISSUE

Both parties agree that the 1980 law must meet the three conditions set forth in Miller Brewing Co. v. State, 284 N.W.2d, 353, 356 (Minn. 1979). The conditions are set forth on page 5 of the Court's decision. The first condition is that the distinctions which separate those included within the classification from those excluded must be genuine and substantial. In the instant case, the Court has held (page 7 of its slip decision):

> . . . The legislative classification for tax purposes based on a distinction between government-supported charities with operations of a commercial nature and privately-supported charitable institutions is not arbitrary and is reasonably grounded.

Thus, the distinctions which separate Respondent from other institutions of purely public charity are that Respondent

is (1) government-supported and (2) has operations "of a commercial nature". However, not all institutions of purely public charity having these same characteristics are taxed by the 1980 law.[4] An example of the latter kinds of organizations is nursing homes like the nursing home in Assembly Homes v. Medicine County, 273 Minn. 197, 140 N.W.2d, 336 (1966). The nursing home in Assembly Homes received its income solely from patients,

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[4]The case of State ex. rel. Mudeking v. Parr, 109 Minn. 147, 123 N.W. 408 (1909) illustrates a classification that failed to treat all members of the class equally. The occupation or class designated by the statute in that case was that of peddling. The court held the statute to be defective because some peddlers were taxed under the statute while others were not. ". . . The legislature is not required to provide for the taxation of occupations; but if such a course is pursued, and any occupation is selected for that purpose, then the burden must fall equally upon the members of the class." (Emphasis added.) 109 Minn. 152, 123 N.W. 410.

from the Veteran's Administration and from the County Welfare Department.[5] Respondent in the instant case received its support from tenants and from subsidies from the federal government. The level of public support received by the nursing home in Assembly Homes was approximately 75% in each of the years. The level of public support in the instant case was from 40-50%. There is no apparent basis for distinguishing the two organizations because of the level of governmental support.

Nor is there any apparent basis for distinguishing the two organizations because of the level of private support received from beneficiaries of the

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[5] In the two years in issue, the nursing home received private contributions of $66.00 in one of the years and no private contributions in the other year.

organization. In Assembly Homes, the amount was approximately 25%. In the instant case, the amount is approximately 50%. Again, no apparent basis suggests itself for differentiating between the two organizations and for concluding that an organization that receives approximately 50% of its support from public sources and 50% from the beneficiaries of the organization "is of a commercial nature" but that an organization receiving 75% of its income from public sources and 25% from its beneficiaries is not.

Respondent therefore submits that a further reason why this matter should be reheard is that the Court has erroneously adopted a classification that taxes only Respondent and organizations like it and not other institutions of purely public charity which are not

distinguishable in any relevant respect from Respondent.

Respectfully submitted,

DOHERTY, RUMBLE & BUTLER
PROFESSIONAL ASSOCIATION

By /s/ Jerome Halloran

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